

EXHIBIT E

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
-----x

3 UNITED STATES OF AMERICA,

4 v.

15 CR 73 (RMB)

5 EVGENY BURYAKOV,

6 Defendant.

ARGUMENT/DECISION

7 -----x

8 New York, N.Y.
9 July 29, 2015
11:10 a.m.

10 Before:

11 HON. RICHARD M. BERMAN,

12 District Judge

13
14 APPEARANCES

15
16 PREET BHARARA,
United States Attorney for the
Southern District of New York
17 ADAM J. FEE
IAN P. MCGINLEY
18 ANNA M. SKOTKO
Assistant United States Attorneys

19
20 WHITE & CASE
Attorneys for Defendant
SCOTT E. HERSHMAN
21 OWEN PELL
22 KELLY NEWMAN

23 ALSO PRESENT: ANDREW TARUTZ, Russian Interpreter
24
25

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1 THE COURT: First we should note that we have a
2 Russian language translator present.

3 I hope you're translating. Are you? Everything,
4 until we get to the point where it may not be necessary.

5 So let me ask Mr. Buryakov if he is able to
6 understand, first of all, through the Russian interpreter,
7 that's Question No. 1.

8 THE DEFENDANT: (In English) Yes, your Honor.

9 THE COURT: And, second, do you want to use the
10 interpreter or shall we have him here in a standby capacity?
11 It's your call.

12 THE DEFENDANT: (In English) In a standby.

13 THE COURT: Okay. Thanks.

14 So we set this date aside for oral argument.

15 Before we hear from the parties, I want to underscore
16 that whatever we say here today, myself or the lawyers, etc.,
17 in no way interferes with or denigrates the presumption of
18 innocence that applies in a criminal case such as this.

19 So sometimes in these motions we sort of sound like we
20 are talking to the merits, but that presumption of innocence is
21 sacrosanct and it applies unless and until a jury determines
22 the outcome of the case, whether the defendant is guilty or not
23 guilty. I wanted to make that clear.

24 I want to frame the issue for a moment just by saying
25 that we have a motion from the defense dated June 11, 2015,

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1 followed up by a reply also from the defense dated July 17,
2 2015, in which the defense has moved to dismiss the indictment
3 in this case and, in the alternative, the defense moves for
4 what is called a bill of particulars. That motion is opposed
5 by the government, which filed its response on or about July 6,
6 2015.

7 And then one other point by way of background. The
8 law or the statute that we will be talking about and construing
9 here this morning is a statute called 18 United States Code,
10 Section 951 and several of its subsections, in particular, a
11 subsection (a) and subsection (d), "D," as in David. There may
12 be references to other aspects of that statute, as well.

13 Just so that it's clear as background, that statute
14 says, in part, the following:

15 Whoever, other than a diplomat or consular officer or
16 attach, acts in the United States as an agent of a foreign
17 government without prior notification to the attorney general,
18 if required in subsection (b), shall be fined under this title
19 or imprisoned not more than ten years or both.

20 And then the subsection (d), which both sides have
21 been discussing in their papers, states as follows:

22 For purposes of this section, the term "agent of a
23 foreign government" means an individual who agrees to operate
24 within the United States subject to the direction or control of
25 a foreign government or official, except that such term does

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1 not include -- then there are some exceptions. The one that we
2 are principally concerned about says: Does not include any
3 officially and publicly-acknowledged and sponsored official or
4 representative of a foreign government.

5 So with that, I'm happy to hear from defense counsel,
6 I'm happy to hear from the government. I have read your
7 papers, and I'm pretty far along in an analysis. I do have
8 some questions of each side, as well, not very many, but one or
9 two.

10 So Mr. Hershman.

11 MR. HERSHMAN: Thank you, your Honor.

12 Is it all right if I stand here?

13 THE COURT: Whatever you're more comfortable with.
14 You can use the podium, if you'd like; otherwise, that will
15 work fine.

16 MR. HERSHMAN: I'll use the podium.

17 Thanks, your Honor.

18 We read your Honor's order with respect to the time
19 limitation of the argument, and we'll adhere accordingly, so I
20 appreciate that. That was helpful.

21 THE COURT: If you want, I'll tell you the question or
22 questions I'm going to ask of you; it may be folded into your
23 presentation.

24 So one question relates to a comment or an argument
25 that you have made where you say that there are potentially

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1 thousands of individuals in the United States like
2 Mr. Buryakov, persons openly working in representative
3 capacities for foreign government agencies and
4 instrumentalities, but in nonconsular, nondiplomatic posts. So
5 I am going to ask you what that means in your opinion and what
6 the implications of that are.

7 And the other question that I'm going to ask you is
8 part of your motion deals or alleges that the government's
9 allegations are insufficient in the indictment in particular.
10 So the question I'm going to ask you is if the government had
11 alleged in the indictment that the statutory exceptions to
12 registration did not apply to Mr. Buryakov, would this moot the
13 first part of your motion to dismiss.

14 And similarly, when the government goes to present,
15 I'm going to ask them if they have any plans to make such an
16 amendment or supersede or however they go about doing that, if
17 they have an intention to do that.

18 MR. HERSHMAN: That's very helpful, your Honor. Thank
19 you. And I'll address both questions.

20 THE COURT: Okay.

21 MR. HERSHMAN: Let me just begin by suggesting
22 something that we all agree on, I believe, to frame the issue.
23 We agree that if the defendant had given notice that he was
24 working for the Russian government, he did not need to register
25 under this statute, under 951.

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1 So the only question is whether saying that he was
2 working for VEB is saying that he's working for the Russian
3 government for purposes of 951.

4 VEB is a specialized development bank created by
5 Russian law and owned and controlled by the Russian government.
6 The U.S. Government itself has said that VEB is part of the
7 Russian government. And we pointed your Honor to the places
8 where the government has said so, but it includes and is not
9 limited to the U.S. Department of Treasury press release upon
10 sanctioning VEB as part of the sectoral sanctions that have
11 been implemented under Executive Order 13662 against VEB, in
12 which the U.S. Government states that VEB is a Russian
13 state-owned financial institution that acts as a development
14 bank and payment agent for the Russian government. It was
15 formed in 2007 pursuant to Russian federal law, and is the
16 legal successor to Vnesheconombank of the U.S.S.R.

17 THE COURT: Could you spell that perhaps for the
18 reporter just so the record will be clear.

19 MR. HERSHMAN: Sure. My apologies.

20 THE COURT: That's all right.

21 MR. HERSHMAN: Which was a specialized Russian state
22 bank. VEB's supervisory board is chaired by the Russian prime
23 minister, and the chairman of the bank is appointed by the
24 Russian president. VEB acts as an agent for the Russian
25 government for the purposes of, and then the press release

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1 continues to go on and state these quintessential government
2 functions, which include, but are not limited to,
3 servicing/repaying the sovereign debts of the former U.S.S.R.
4 and Russia, and collecting debts from legal entities of Russia
5 municipal governments, providing and executing state guarantees
6 of Russia and so forth. These are quintessential government
7 functions. And, your Honor, we've cited case law in this
8 circuit that confirms that those are quintessential government
9 functions.

10 So the U.S. Government itself has stated that VEB is
11 part of the Russian government. But we really want to direct
12 your attention, your Honor, to the regulations that expressly
13 define what is a foreign government for purposes of this
14 statute. These are regulations created by the government, and
15 these are regulations that directly address the question at
16 issue.

17 In 28 CFR, Section 73.1, which is cited repeatedly in
18 our papers, the government has included a definition of
19 "foreign government" for purposes of Section 951. This is not
20 a definition that they rely on in their papers. They run away
21 from this definition, although it is expressly relevant and
22 directly relevant to the question at issue.

23 THE COURT: You cite it in your papers.

24 MR. HERSHMAN: Yes, we did.

25 The government refers to Section 11 of 18 U.S.C.,

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1 which simply says that foreign government as used in that title
2 includes, and then it goes on to say what is included. But
3 this statute specifically addresses the definition of "foreign
4 government" for purposes of 951, and it is broader, but
5 inclusive, of what is in Section 11, specifically with respect
6 to government factions or bodies of insurgents within a country
7 with which the United States is at peace. That was the purpose
8 of Section 11.

9 73.1 includes that and is broader. And there it
10 states specifically that the term "foreign government" includes
11 any person or group of persons exercising sovereign de facto or
12 de jure political jurisdiction over any country other than the
13 United States or over any part of such country. And
14 importantly, it includes, quote, any subdivision or any such
15 group or agency to which such sovereign de facto or de jure
16 authority or functions are directly or indirectly delegated.

17 In this case, your Honor, the government argues that
18 VEB does not fall within the definition of a foreign government
19 capable of sponsoring Mr. Buryakov's visit to the United States
20 under Section 951 by omitting that part of the regulation that
21 expressly defines the term "foreign government."

22 This term, as expressly defined in 73.1, is quite
23 broad, and it includes a person or group of persons exercising
24 sovereign political jurisdiction over a country and any group
25 or agency to which the sovereign authority or functions are

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1 directly or indirectly delegated. As I mentioned, in the press
2 release the government admits that this is a group of persons
3 who exercise sovereign political jurisdiction over the Russian
4 Federation. And, more important, it is an agency to which
5 sovereign authority or functions have been directly and/or
6 indirectly delegated.

7 The Russian prime minister, as mentioned and admitted
8 by the government in their press release, is the head of the
9 supervisory board. And the members of the supervisory board,
10 your Honor, include first deputy chairmans of the Russian
11 government, deputy chairmans of the Russian government,
12 minister of economic development of the Russian Federation,
13 deputy chairman of the Russian government, an aide to the
14 president of the Russian government, the finance minister of
15 the Russian Federation, and the chairman of the bank.

16 There is no question that those are --

17 THE COURT: Is your client on that board?

18 MR. HERSHMAN: No, he is not, your Honor. My client
19 is a representative of that bank.

20 THE COURT: Okay. So I wouldn't mind if you get to
21 one of the questions I posed.

22 So does that mean that everybody who works for VEB
23 Bank in New York, janitor, secretary, I don't know how many
24 people there are, does that mean they are all covered as
25 Mr. Buryakov is?

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1 MR. HERSHMAN: No, your Honor. It would cover people
2 with supervisory responsibilities, which Mr. Buryakov clearly
3 had at the bank.

4 THE COURT: Where does that delineation come from that
5 they have to have supervisory responsibility?

6 MR. HERSHMAN: That is in the case law, and it's in
7 the -- I think we cite it, in 73.1, a more expansive definition
8 of what is a person who would fit the definition in that
9 particular respect. It would not apply to janitors, it would
10 not apply to temporary workers; it would apply only to
11 supervisory persons, of which he clearly is.

12 THE COURT: Where exactly is that language?

13 MR. HERSHMAN: I'll show you the page, your Honor.
14 Let me direct you to that page.

15 If your Honor turns to 73.1(e). I'm getting you the
16 page in our brief that says this.

17 (Pause)

18 MR. HERSHMAN: Just one second, your Honor. I'll pull
19 it. It is an important point.

20 (Pause)

21 MR. HERSHMAN: I will suggest, by the way, that there
22 is no dispute by the government that Mr. Buryakov had
23 supervisory responsibilities.

24 THE COURT: I'm just trying to figure out who's in and
25 who's out.

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1 MR. HERSHMAN: Right. Got it.

2 (Pause)

3 MR. HERSHMAN: If you look on page 11 of our
4 memorandum of law in support of the motion, this is Subsection
5 (b), we refer to the argument your Honor is addressing now
6 where 951(d)(2) follows a separate statutory exemption for a
7 narrow class of foreign persons, and then proceeds to statutory
8 exemption for a wider class of foreign persons, namely, any
9 member of a staff of or employee of individuals described in
10 (1) and (2). And the argument, therefore, is that 951(d)(2),
11 which is this section that is relevant here, reaches a class of
12 foreign officials and representatives who, like Mr. Buryakov,
13 as VEB's deputy representative, do not on the one hand qualify
14 as diplomats or consular officers under (d)(1), but who, on
15 the other hand, occupy more senior roles than staffers under
16 (d)(3).

17 THE COURT: Is that where you draw the conclusion that
18 there are potentially thousands of individuals in the United
19 States like Mr. Buryakov, those thousands of people all fit
20 into this statutory scheme?

21 MR. HERSHMAN: Yes. But they are not limited to
22 Russian Federation agencies. It would include every foreign
23 country.

24 THE COURT: The thousands are from every country, not
25 just, of course, from Russia?

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1 MR. HERSHMAN: Yes.

2 Russia and many other countries have state-owned
3 economic investment banks, so it would be France, Japan,
4 Canada, China, even the United States does, EXIM Bank.

5 The point that we were making, your Honor, is that
6 there has never been a prosecution of anyone in a position like
7 Mr. Buryakov, because clearly Mr. Buryakov and anyone similar
8 to him in a supervisory role at a foreign government as defined
9 by the statute would not be required to register. This is, to
10 our knowledge, the first time the government has alleged that
11 there's a violation of 951 for someone who clearly is working
12 as an official of a foreign government.

13 THE COURT: Let's assume for the moment -- and, again,
14 this is just assumption because of what I said at the outset.
15 Let's assume that -- is this a loophole in which foreign
16 governments could send thousands of people who are -- I'm just
17 using the word for purposes of discussion -- spies to the
18 United States, and they wouldn't have to register, is that --

19 MR. HERSHMAN: Well, it's an interesting point, your
20 Honor, because that's exactly the point that the United States
21 Congress made when the Department of Justice presented this
22 exception to them as part of the amendment to 951. And, in
23 fact, the U.S. Senate asked the Department of Justice, Hey,
24 wait a second. Isn't this a way in which foreign countries, in
25 particular communist bloc countries at the time --

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1 THE COURT: Or anybody.

2 MR. HERSHMAN: -- or anybody would send covert
3 operatives into the United States and why do you want to
4 exclude them from the registration, to which the U.S.
5 Government responded, We know, we get it, and, yes, we want to
6 exclude them. So it was intentional.

7 THE COURT: Your response today, putting aside what
8 they said in their legislative debate, what's your response to
9 my question?

10 MR. HERSHMAN: I don't believe it's a loophole at all,
11 your Honor. I believe it was intentional in a way to manage
12 the registration and basically suggest that if you're here and
13 we know that you're here working as a representative of the
14 foreign government as we defined it in 951, you needn't
15 register under this section; it is not a crime for you to not
16 have registered. Clearly, Mr. Buryakov was working for a
17 foreign government as defined by the government in Section 951,
18 under 73.1, and he did not need to register.

19 It is not a loophole; it's the law. And we think that
20 the law here, which the government ignores entirely in their
21 papers, is clear and controlling.

22 THE COURT: It's not a loophole, but you're saying
23 it's a vehicle for foreign governments to send in covert
24 operatives legally into the United States. Is that the
25 conclusion?

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1 MR. HERSHMAN: I'm not suggesting something to foreign
2 governments that they can now employ as a means of sending in
3 foreign operatives. What I'm suggesting is that this exact
4 issue was raised.

5 THE COURT: That's the implication though.

6 MR. HERSHMAN: And the implication was actually
7 raised.

8 THE COURT: And that's how you're trying to include
9 Mr. Buryakov in that. I'm not saying he's guilty of any
10 infraction whatsoever; but, conceptually, is that a vehicle for
11 sending in covert operatives legally into the United States, in
12 your opinion?

13 MR. HERSHMAN: In my view, your Honor, it is a
14 regulation that exempts from registering foreign officials who
15 are working for a foreign government as defined by the statute
16 who entered the United States legally.

17 Let me just refer your Honor to page 7 of our
18 memorandum of law where we quote Senator Denton.

19 THE COURT: No, no, I'm familiar with that. But if
20 you'd like, you can quote it now.

21 MR. HERSHMAN: Thank you, your Honor.

22 Senator Denton asked the Department of Justice at the
23 time of the amendment to this particular statute in 1984 that
24 included this exception, and I'll quote: Some have suggested
25 that diplomats, foreign government officials, and print and

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1 broadcast media personnel be exempted from 1959, that's the
2 predecessor to 951's coverage. However, aren't these the
3 positions that are most usually used by communist bloc
4 countries as cover for their intelligence agents.

5 THE COURT: Good question.

6 MR. HERSHMAN: It was a good question.

7 The issue was raised to the Department of Justice in
8 1984 at the time, and the Department of Justice supported the
9 implementation of this exemption and answered the question that
10 they understand it and said yes, and we support this particular
11 amendment.

12 The issue was not to have foreign government make
13 registration harder for U.S. people abroad.

14 THE COURT: I'm sorry, the issue was not what?

15 MR. HERSHMAN: To have foreign governments make
16 registration more difficult for U.S. people abroad. And so
17 there's reciprocity kind of working here. Everything that we
18 do is mirror-imaged on the other side, and this was part of
19 what was discussed at the hearing in 1984, when this particular
20 exception was created, and it was created knowing that this was
21 a potential, that there could be people coming under cover of
22 working for another foreign --

23 THE COURT: Spies.

24 MR. HERSHMAN: -- for a foreign government, and they
25 may not be who they say, as Senator Denton pointed out.

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1 You don't believe, by the way, that's Mr. Buryakov.

2 THE COURT: No, no, of course. That was my original
3 point.

4 But you happen to know, just as a matter of curiosity,
5 whether Russia has a reciprocal provision that we could send
6 people to Russia and spy for the United States under a
7 similar -- you're not calling it a loophole, but under a
8 similar provision?

9 MR. HERSHMAN: I don't, your Honor. But I seem to
10 recall -- and, again, I want to check this, so I'm suggesting I
11 need to check this, but I seem to recall that there was some
12 congressional testimony regarding the reciprocity, if you will,
13 use of this kind of mechanism. I will check that and report
14 back to you. I don't want to be quoted as misrepresenting
15 that.

16 THE COURT: Fair enough.

17 It might be an older time period that may not be
18 current today.

19 MR. HERSHMAN: Correct. Exactly.

20 But at least at the time of the enactment of the
21 exception, which the government was okay with because they knew
22 that these people were all here. And that's the point, right,
23 is that when Mr. Buryakov was sponsored to come to the United
24 States by VEB, a part of the foreign government of the Russian
25 Federation under the definition here, there was no hiding that

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1 he was coming here to engage in as an agent of VEB. He's not
2 shy of saying that, and he --

3 THE COURT: There was no hiding that he was here to be
4 the deputy for the bank.

5 MR. HERSHMAN: Correct. That's exactly right.

6 THE COURT: He didn't say that he was coming to do
7 anything unlawful on behalf of the Russian Federation.

8 MR. HERSHMAN: We would argue that he hasn't.

9 THE COURT: Of course.

10 MR. HERSHMAN: In all events, your Honor, that's not
11 what the statute requires, right. Once the government is on
12 notice that you're here, that's all that's required, and you
13 are not required to register.

14 So the plain language is clear in the statute. The
15 legislative history is clear, your Honor. And there's no
16 question that the defendant here is an agent of the Russian
17 government through his role at VEB. He wasn't shy about it --

18 THE COURT: There's a question. There's no question
19 in your mind.

20 MR. HERSHMAN: Yes.

21 THE COURT: They have challenged that.

22 MR. HERSHMAN: They have, but not by applying the
23 actual statute. They've applied some completely different
24 analysis which has no relevance to the issue before the Court.

25 He worked for a state-owned bank; he was officially

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1 and publicly acknowledged and sponsored by a foreign
2 government; his status was known, and his visit authorized by
3 the Department of Homeland Security. There was no question
4 about that. He falls squarely into the exception of (d)(2) in
5 Section 951.

6 Your Honor asked a question about 951(d) and our
7 argument about the government's failure to plead the exception
8 in the indictment. And, yes, your Honor, with respect to that
9 aspect of our motion, it is fatal to the indictment.

10 Where an exception is incorporated in the enacting
11 clause of a statute, the burden is on the prosecution to plead
12 and prove that the defendant is not within the exception. We
13 cited a Supreme Court case for that direct proposition, the
14 Vuitch case. I probably mispronounced it, but --

15 THE COURT: If you could spell that.

16 MR. HERSHMAN: V-U-I-T-C-H.

17 Actually, maybe I got it right, I don't know.

18 But 951(d) expressly creates an exception that is
19 incorporated in the enacting clause of 951(a), through the
20 definition of the term "agent of a foreign government." And it
21 was therefore fatal for the government to not plead that
22 exception.

23 THE COURT: Not to plead it.

24 MR. HERSHMAN: Correct.

25 THE COURT: But if they did, that argument, I suppose,

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1 would be moot.

2 MR. HERSHMAN: We would not have made the argument if
3 they did, your Honor. But I don't think that they can, because
4 if they adhere to the definitions in the statute and
5 regulations, it's impossible for them to plead that exception,
6 because it applies to Mr. Buryakov, and it applies as a matter
7 of law. This is not a factual issue; this is an issue of law.
8 The definition is contained --

9 THE COURT: Of course they argue it in their papers.

10 MR. HERSHMAN: They do, but, again, they ignore the
11 law. And our point is that if they follow the law, which is
12 the definition of foreign government --

13 THE COURT: I get that. But they have made the point
14 in their motion papers, although they haven't pled the
15 exception, as it were, in the indictment. That's true, right?

16 MR. HERSHMAN: They make the argument that they don't
17 need to plead the exception, and they cite a case for pleading
18 affirmative defenses, which is entirely different than what is
19 here. This is not an affirmative defense. This is part of the
20 enacting clause.

21 THE COURT: They cited a 1922 case from the Supreme
22 Court.

23 MR. HERSHMAN: The more recent case they cite, I
24 think, was an affirmative defense case which they rely on. And
25 that is not the issue here. This is an enacting clause of a

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1 statute.

2 THE COURT: The 1922 case, though, is not an
3 affirmative defense case; isn't that right?

4 MR. HERSHMAN: I don't believe so. But the more
5 recent case they cite is. And our case is a 1971 case, which
6 is directly on point, we believe.

7 So, your Honor, I want to be mindful of the time
8 limitation that you set, and I appreciate it.

9 THE COURT: I asked a whole bunch of questions, so if
10 you have a couple more points you want to make --

11 MR. HERSHMAN: That's okay, your Honor.

12 What I'd like to do is just briefly address the bill
13 of particulars issue and then I'll sit down.

14 I think I've made my points on the 951. And again,
15 I'm happy to answer any additional questions on that point.

16 With respect to the bill of particulars, your Honor,
17 this is going to be a combined bill of particulars argument and
18 just updating the Court on the status of the discovery issues
19 because they are related.

20 Mr. Buryakov is in custody clearly. And even if he is
21 convicted after trial, which we doubt, any sentence might well
22 not be very long, depending on what the guidelines and the
23 Court chooses to apply here. Without some more specification
24 by the government of the relevant discovery, it will likely
25 take a very, very long time for us to prepare this case for

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1 trial because we will need to review everything.

2 And now I want to put this in context. The volume of
3 data is humongous. There's 5,000 hours of video, over two
4 and-a-half years. I would venture to say, your Honor -- and
5 I'm not exaggerating -- that virtually all of it is irrelevant.
6 There's 1500 hours of wiretaps. I'd venture to say that of
7 those wiretaps, virtually all of them are irrelevant. There's
8 15 terabytes of data.

9 The data includes everything that was seized by the
10 government from Mr. Buryakov's office and his home and his
11 person at the time of his arrest and the execution of the
12 search warrants. That includes -- and I've seen these, so I
13 can attest to it -- video of his family's birthday parties,
14 pictures of his family, shopping lists, etc., etc., etc. It's
15 virtually all irrelevant.

16 We do not have a particular way, from what was turned
17 over to us, of identifying specifically what the government
18 intends to rely on and what they actually claim proves their
19 case.

20 THE COURT: So I got that point from the papers.

21 Have you had the opportunity with Mr. Fee to meet and
22 confer about these issues?

23 MR. HERSHMAN: Yes.

24 THE COURT: Have you made any more progress than
25 what's reflected in the papers?

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1 MR. HERSHMAN: Not exactly, your Honor, and with
2 credit to Mr. Fee and the government, okay, because our
3 conversations have been productive and helpful.

4 Mr. Buryakov still does not have access to the video
5 that we brought to your attention quite a long time ago. The
6 government has delivered the video, as I understand it, to the
7 MCC, but it hasn't worked. Mr. Buryakov simply does not have
8 access to it and still doesn't.

9 THE COURT: You mean the technology there hasn't
10 worked?

11 MR. HERSHMAN: That's right.

12 Second, I am unable to review any of this material
13 directly with Mr. Buryakov because I can't bring it into the
14 MCC in a form that is usable. So I can bring a CD into the
15 MCC, but I can't take 5,000 hours of video and dummy it down to
16 a CD. It would take a building full of CDs in order for that
17 to happen. It's impossible. I have been discussing this with
18 Mr. Fee. We've been discussing possible alternatives.

19 In fairness, your Honor, it's kind of the same issue
20 and, at the same time, a separate issue. One is do I really
21 need to review 5,000 hours of videotape.

22 THE COURT: Right. I get it.

23 MR. HERSHMAN: And the second is how am I going to
24 review this material with Mr. Buryakov in a way that allows us
25 adequately to prepare a defense in this case.

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1 THE COURT: So it's that discussion I'm wondering if
2 you -- are you still talking about that?

3 MR. HERSHMAN: We are. We are, but we may need the
4 Court's intervention.

5 THE COURT: I see.

6 MR. HERSHMAN: There's one suggestion that we bring
7 Mr. Buryakov to a proffer room at the courthouse. The problem
8 with that is that a U.S. Marshal would need to be present in
9 the room. That's not particularly acceptable to us. We can't
10 have private, frank conversations with our client.

11 THE COURT: What's the technology problem at the MCC?

12 MR. HERSHMAN: The data is on five or six hard drives,
13 and we're not permitted to bring any mechanism into the prison
14 itself except for a CD.

15 THE COURT: Except for?

16 MR. HERSHMAN: CD. And the data is too dense to be
17 transferred to a CD. It's even too dense to be transferred to
18 a DVR; it's on hard drives, and it's huge.

19 The second problem is that the computers that are in
20 the lawyer rooms at the MCC are antiquated and, we think, not
21 up to current technology specs. So they are not able to read
22 the information, even if it's there, hence the problem that
23 Mr. Buryakov has in not being able to see the video.

24 THE COURT: No, I get it. It is somewhat ironic that
25 they have the capability to make the videos and the recordings,

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1 but not the capability to display them. But that's something
2 else.

3 MR. HERSHMAN: There's a third problem, which includes
4 the software that was used or is used by the government, I
5 believe it's called NCASE, which is not publicly available and
6 requires us to engage a vendor, which we are in the process of
7 doing, to actually search and view the material. So all of
8 this is complicated by the fact that we don't even know what we
9 are looking for.

10 So that's my bill of particulars piece.

11 THE COURT: Okay.

12 MR. HERSHMAN: Thank you very much, your Honor.

13 THE COURT: Thank you.

14 Mr. Fee.

15 MR. FEE: Yes, your Honor.

16 THE COURT: Could you just, since my curiosity is so
17 aroused -- so this issue about pleading the exception, are you
18 stymied in doing that or is that something you might do or
19 could do?

20 MR. FEE: Your Honor, we could obviously quickly fix
21 that. Our position is that there is no fix required. We cite
22 Second Circuit and Supreme Court law that you don't need to
23 specifically negate every exception to a statute. There are
24 obviously other statutes.

25 THE COURT: I got the legal argument; I'm just

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1 thinking about the practical one would moot a whole part of the
2 defense, as Mr. Hershman has indicated.

3 MR. FEE: It would certainly moot it, your Honor.

4 I would also point out just for the Court's
5 edification that in the indictment, there is a clause -- and
6 it's in paragraph 6 with respect to Count One, it's also in
7 Count Two -- where we allege that Mr. Buryakov worked as an
8 agent of the SVR, we say: Without prior notification to the
9 attorney general, as required by law.

10 Your Honor, we would submit that even to the extent
11 that it was required to somehow plead that the exceptions did
12 not apply, that, at least indirectly, doesn't. The allegation
13 is he was required to register and did not.

14 THE COURT: No, no, not to belabor the point, but you
15 certainly argue in your papers that he's not covered by the
16 exception, right? So I'm just wondering if this is an easy
17 cure -- not a cure, if it's something you contemplate doing.

18 Mr. Hershman says you can't do it, as a legal matter.
19 But you do do it in your submissions, that is to say, make
20 those arguments.

21 Is there anything stopping you from doing it in an
22 indictment, in a superseding indictment, for example?

23 MR. FEE: No, your Honor, there's nothing stopping us
24 from that. We could do so quickly.

25 As to the legal points or the arguments made by

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1 Mr. Hershman, I'll just pick up on the question the Court
2 asked, specifically the contention that the defendant makes
3 that there are potentially thousands of individuals like the
4 defendant in the United States. So that is true in one
5 respect, but I think this point does highlight really the
6 absurd reading, the strained reading that the defendant has
7 urged upon this Court. It would eviscerate Section 951. There
8 are -- I don't know if it's thousands -- many people employed
9 by state-run corporations.

10 THE COURT: Not just the VEB Bank, right?

11 MR. FEE: Not just VEB Bank. Other state-owned
12 corporations that are owned by the Russian Federation, as well
13 as other countries, friend and foe.

14 THE COURT: There probably are thousands altogether.

15 MR. FEE: It certainly could be thousands, maybe even
16 tens of thousands here in the United States.

17 Important point: VEB, as I imagine many of those
18 other corporations, is a freestanding company under Russian
19 law. It is not an arm or an agency of the Russian Federation.
20 Your Honor, that was and, I believe, is the position of
21 Mr. Buryakov. He urged that exact position upon this Court.
22 In fact, those are his words: VEB is a freestanding company
23 under Russian law; it is not an arm or agency of the Russian
24 government, but has a separate and independent corporate
25 existence that is well-recognized under U.S. law.

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1 THE COURT: He did that back in May, not, it should be
2 clear, in arguing this motion. At the time he was arguing
3 about who was paying for his counsel. And it's in that
4 context -- I'm just setting the --

5 MR. FEE: Correct, your Honor.

6 THE COURT: It is in that context that he or counsel
7 made these comments which seemed to contradict -- I think it's
8 fair to say they are at odds somewhat with the contentions that
9 are made in the course of the motion to dismiss.

10 MR. FEE: That is the context, your Honor. And
11 lawyers make arguments, but those are facts. And when
12 Mr. Buryakov's counsel stated those facts, the U.S. Government
13 did not dispute them because they are true.

14 I would urge the Court -- I know it is doing so --
15 when you listen to Mr. Hershman's arguments, please look at the
16 actual text of the statutes, the regulations, and the things
17 attached to his own motion, to Mr. Buryakov's own motion,
18 including the enacting law under Russian law that created VEB.
19 We highlight this in the brief; I won't detail it here. I
20 would note the broad point that statute uses the Russian
21 Federation and VEB separately. It says, the Russian Federation
22 cannot interfere with VEB. The liabilities of the Russian
23 Federation are not the liabilities of VEB.

24 THE COURT: And vice-versa.

25 MR. FEE: And vice-versa.

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1 Mr. Buryakov and the bank branch of New York confirmed
2 this fact, that they are distinct. They confirmed it in their
3 actions. Mr. Buryakov held himself out from the time he
4 entered the United States, as the Court observed, as
5 Mr. Hershman said, as an employee of the bank, as a banker. He
6 stated it over and over on his visa applications for a work
7 visa, an L-1 work visa, as they call it. He obtained a visa
8 for an intracompany transfer, from one branch of the bank to
9 another. The bank itself, the New York branch which applied
10 for his visa, signed by the deputy representative of the bank
11 in New York, stated over and over and over and over again this
12 man's business was to be a banker engaged in international
13 banking in New York for the bank.

14 Your Honor, it is a very important point. Your Honor
15 asked it. At no point did Mr. Buryakov ever identify himself
16 as an official representative of the Russian Federation, of the
17 foreign government, the word used in Section 951. This is not
18 complicated. Mr. Hershman has urged upon this Court some ad
19 hoc, frankly, strained readings.

20 The Court asked Mr. Hershman to point out where he
21 drew this distinction from, under his reading of the statute,
22 that supervisors somehow were exempt, but janitors weren't.
23 Your Honor, I think it was clear he could not point out where
24 he drew that distinction from. He was making arguments based
25 off of the structure of the statute, but there was no such

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1 distinction drawn.

2 I think another thing that highlights --

3 THE COURT: You're saying there was no specific
4 distinction between supervisors, whoever that might be, and
5 anybody else.

6 MR. FEE: There's not even a whiff of a distinction
7 because it's not there.

8 I think another point to highlight, legislative
9 history, as they've called it, and I think this is even on the
10 edges of whatever that may be, has become front and center in
11 their argument.

12 I would urge the Court -- and I know it has -- to read
13 exactly what Mr. Hershman pointed to. It's a statement by a
14 government official talking about diplomatic privileges and
15 immunities, help U.S. diplomats abroad, so we don't want to
16 exclude those or make those people register in the U.S.

17 It is not about the exception at issue here, your
18 Honor. It is not even close to being about the exception. 951
19 has an exception for diplomats; that is not what Mr. Buryakov
20 is arguing applies to him. He's arguing something applies to
21 him which frankly is not even close to applying.

22 I would just focus, to move away from the point, I
23 will briefly touch on another portion of the phrase "officially
24 and publicly acknowledged and sponsored official or
25 representative of a foreign government."

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1 Addressed the foreign government point, your Honor,
2 frankly, I don't think it's close to say he was here on behalf
3 of that. Officially and publicly acknowledged and sponsored,
4 whatever that may mean, it does not apply to Mr. Buryakov.

5 There were essentially two core deceptions, as alleged
6 in the indictment, which are presumed to be true at this stage,
7 two core deceptions that explain how this defendant came to New
8 York and engaged in work on behalf of the Russian spy organ.

9 First is that he was a banker, as he stated over and
10 over in applying for an L-1 visa. I would just note, your
11 Honor, that the L-1 visa, the forms attached to this
12 defendant's motion, explains the purpose of an L-1 visa. It's
13 in the papers. It says it's for foreign companies doing
14 business in the U.S. We've outlined some other language in
15 that visa and the applications themselves that make clear it
16 did not confer any status.

17 He held himself out only as a banker for VEB. That's
18 the first exception. The second is he stated repeatedly, under
19 penalty of perjury, that he was not entering to try to engage
20 in espionage. The government would submit those were both
21 lies. That is not officially and publicly acknowledging
22 oneself as an official of a foreign government, the Russian
23 Federation. It is the opposite. It's a banker getting a work
24 visa applied for on behalf of his bank to come here and be a
25 banker and to not even do that, your Honor.

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1 The final point I would make just on -- this again
2 relates back to the point about who else would be covered, the
3 loophole that could be created.

4 THE COURT: Before you do, you have some allegations,
5 both, I think, in the indictment and certainly in the papers
6 that suggest that Mr. Buryakov -- and I don't know if they are
7 called codefendants, they are the government officials who were
8 apparently not in the country anymore. I don't know if
9 "codefendant" is the right terminology.

10 But, in any event, they were, according to you, agents
11 of the foreign government engaged in espionage or related
12 activities. You allege or state that there are conversations
13 among them to which the objective was to obscure the fact that
14 Mr. Buryakov was undertaking actions that were not for his
15 employer in particular, right?

16 MR. FEE: Correct, your Honor.

17 THE COURT: They were totally separate and distinct
18 from any actions he might take as a banker.

19 Is that a fair statement?

20 MR. FEE: That is a completely fair statement. And
21 those two men were charged in the same indictment; they are
22 obviously not here. They, unlike Mr. Buryakov, had official
23 cover; they were diplomats and consular officials for the
24 Russian Federation.

25 To pivot off that point, your Honor, there are other

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1 allegations in the complaint, of which the Court can certainly
2 take notice of here, that make the same point.

3 The information Mr. Buryakov was obtaining as a spy
4 was not being funneled to his superiors at the bank in New
5 York; it was being funneled to a trade official, an attach to
6 the Russian ministry. Other spies with whom he had no other
7 reason to be channeling this information. And we go into,
8 frankly, great detail in the complaint.

9 One final point, your Honor.

10 The reading of the government would not result in
11 this, essentially, rendering Section 951 a dead letter. People
12 like Mr. Buryakov who are here on behalf of, to use his own
13 words, his counsel's words, freestanding companies, would not
14 be covered by what we've called a sponsored official exemption
15 because they are not officials of a foreign government; they
16 work for a corporation.

17 Your Honor, they would -- although it is not an issue
18 before the Court -- be covered by a different exemption, the
19 legal commercial transaction exemption, Section (d)(4). And it
20 is significant that it's not even argued here that it could
21 apply to the defendant, because it wasn't, there is nothing
22 legal about what he was actually doing.

23 Your Honor, unless there's any other questions on the
24 statute point, I'll move on to the bill of particulars.

25 We obviously argued the vagueness point in our papers.

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1 THE COURT: My question to you is the same one as to
2 Mr. Hershman on bill of particulars. Do you have any plans
3 afoot to talk to him and solve some of these essentially
4 discovery problems or difficulties that he's having?

5 MR. FEE: Absolutely, your Honor. There's sort of a
6 process point, and then there's, I guess, a substance point.

7 The process point, Mr. Hershman raised with me
8 yesterday, this issue he's having, that he cannot bring in
9 anything other than disks, the government's interests are the
10 same as his. We want him to have every opportunity to review
11 the discovery himself and certainly with his client. We have
12 reached out to legal counsel at the MCC. I am discussing with
13 colleagues in my office some creative interpretations, creative
14 solutions, including -- I don't know if we can do this yet --
15 finding a clean way to get in all the discovery, say, on a
16 clean laptop that is routed through MCC Legal rather than
17 carried in by counsel. We will work as quickly as we can and
18 we'll report to the Court and, of course, keep talking to
19 Mr. Hershman.

20 He characterized accurately the other process point,
21 which is the technical issues we've been having at the MCC with
22 getting the surveillance footage just to work. We are now
23 converting it into another format, and we will update
24 Mr. Hershman and the Court and try to do that as quickly as
25 possible.

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1 As far as the substantive requests underlying the bill
2 of particulars, Mr. Hershman couched his argument in really
3 broad terms, your Honor. I would just point the Court to pages
4 22 and 23 of Mr. Buryakov's opening brief which outlines the
5 specific requests that were made to the government and which he
6 now makes as part of his motion.

7 Your Honor, first, frankly, the complaint and the
8 discovery in this case are exceedingly detailed, especially the
9 complaint. I know your Honor has read it. It does exactly
10 what Mr. Hershman argued did not happen here; it outlines what
11 the evidence is, dates and times of meetings, the substance of
12 conversations, the identities of the people involved in the
13 meetings. And to highlight the fact that, frankly, I think
14 most of the information they are saying they don't have, they
15 already have.

16 THE COURT: Well, there's two categories. One is can
17 you help him simplify his search or his review of the materials
18 that you have provided. He's saying there are hundreds or
19 thousands of hours that are not relevant. One question he's
20 asking is can you help him pinpoint where to find the relevant
21 information. That's one.

22 Two is he may be asking you for additional -- he is,
23 in fact -- information in some regards.

24 My point is that most often, cases that I've presided
25 over, counsel, working together, meeting and conferring,

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1 usually can eliminate many of these problems that seem still to
2 exist in terms of the papers, the motion and opposition.

3 MR. FEE: Of course, your Honor, that is always the
4 best solution; and, yes, we will continue to do that. If there
5 are any additional requests, we will address them and try to
6 help in the best way we can.

7 Our motion related to these six numbered requests,
8 just to point out that each of these requests actually is
9 phrased as the following: We want this information, excluding
10 the meetings or items referred to in the complaint paragraphs,
11 and then it names five or six paragraphs. Each request has an
12 exclusion.

13 Frankly, your Honor, that is a lot of detail already
14 in the defendant's possession. The government has attempted to
15 address more specific concerns. I know the Court has seen this
16 in the papers; we provided a letter. You hear a lot of
17 references to all the surveillance footage. We are doing our
18 best to narrow that. We know it's a lot. We've provided
19 detail. When we find more meetings on that surveillance
20 footage, we will give another list. So we want to make this
21 review as easy as we can for the defense.

22 THE COURT: Okay.

23 MR. FEE: Unless there's anything further, your
24 Honor --

25 THE COURT: The last question, not to beat a dead

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1 horse, but is there any plan afoot to amend or supersede to
2 plead, as he says is legally required, the exclusions or the
3 exemptions?

4 MR. FEE: Your Honor, our position is it's not legally
5 required. Quite frankly, it would be a fairly meaningful
6 change in pleading practice not only in this district. It is
7 not the normal course, to use the language of the courts, to
8 negative every exception in a statute. Absent an order from
9 the Court, doing so or, frankly, some compelling precedent
10 cited for us, we don't have any plan. But of course your Honor
11 is correct that we can quickly -- if this is the right
12 phrase -- fix that in the event the Court deems it necessary.

13 THE COURT: Okay.

14 MR. FEE: Thank you, your Honor.

15 MR. HERSHMAN: Briefly, your Honor.

16 THE COURT: Yes.

17 MR. HERSHMAN: It seems, based on Mr. Fee's argument,
18 that the Department of Justice is looking now to rewrite the
19 regulation that controls the application of 951 and, again,
20 ignores 73.1, which specifically defines foreign government as
21 I discussed earlier.

22 What's interesting is the issue was actually raised
23 prior to the enactment of the regulations in the statute by the
24 Senate and discussed by the DOJ.

25 THE COURT: This is 1984?

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1 MR. HERSHMAN: Yes.

2 There's another quote that I want to give which kind
3 of puts what Mr. Fee is suggesting the Court do here, which is
4 essentially rewrite 73.1 in the regulations in this case.

5 The government, the Department of Justice, stated in
6 enacting the amendments to 951(d) and the exception at issue
7 here: "Even extensive communist bloc use of diplomatic media
8 or other covers for their intelligence operatives does not, in
9 our opinion, destroy the utility or desirability of exempting
10 such categories of personnel from the provisions of this
11 statute."

12 That's the position of the Department of Justice. It
13 can't be rewritten for this case in this courthouse.

14 Second, I referred earlier to a recollection --

15 THE COURT: That assumes that I --

16 MR. HERSHMAN: Yeah. And I apologize. But Mr. Fee
17 would urge the Court to do that.

18 I mentioned, your Honor, that I had some recollection
19 about a reciprocity statement made in connection with the
20 enactment of the amendments to -- well, actually, it goes back
21 earlier in the enactment of the bill, 1981. There is a quote
22 from the Department of Justice in which -- and it follows the
23 quote I just read about the question raised about using cover
24 and wouldn't this be a loophole, as your Honor referred to it.
25 The government responded.

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1 One part of the response was as follows --

2 THE COURT: This is response by whom?

3 MR. HERSHMAN: The Department of Justice. This is in
4 connection with the 1984 amendments in response to Senator
5 Denton's questions. It's not quoted in our papers, but it's
6 part of the official record of the congressional hearing on
7 this amendment.

8 The Department of Justice said: "Finally, under the
9 principle of reciprocity, new restrictions simply invite
10 retaliation; and the president favors expanding, not
11 contracting, the contest of ideas with the Soviets."

12 So my recollection was to that point, your Honor. So
13 that addresses the reciprocity aspect.

14 THE COURT: This from me is just dicta.

15 MR. HERSHMAN: I wanted to just complete the record.

16 THE COURT: No, no, no, no, I mean what I'm about to
17 say.

18 MR. HERSHMAN: Oh.

19 THE COURT: It's probably fair to say that people said
20 a lot of things in the '80s that might not be said today, just
21 generally speaking. I'm not saying that literally applies to
22 what you just said.

23 MR. HERSHMAN: I appreciate that, your Honor. The
24 Department of Justice has had opportunity to change the statute
25 or seek to change the statute, and they haven't done, so other

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1 than through Mr. Fee.

2 I want to point out also in connection with the
3 suggestion that there was no openly-acknowledged role here with
4 respect to Mr. Buryakov and what VEB actually is in terms of
5 its application, its statement to the United States, in
6 connection with Mr. Buryakov's application through VEB to come
7 to the United States back in 2010. VEB wrote a letter to the
8 Department of Homeland Security in which it described the bank
9 for development of foreign economic affairs, VEB, by saying
10 that VEB of the U.S.S.R. was originally established in 1924 as
11 the Soviet Union's bank for foreign trade. The bank's role is
12 as an agent of the Russian government in international trade
13 and economic development.

14 According to the Russian legislation, VEB is a
15 specialized state bank of Russia and is entrusted with
16 providing external debt servicing, as well as the centralized
17 foreign economic operations for Russia. Worldwide, VEB
18 currently employs 1200 people and achieved, and it goes on to
19 describe.

20 This was in the sponsoring petition to the United
21 States Government for approval to issue a visa for Mr. Buryakov
22 to come to the United States as the deputy representative in
23 the United States for VEB. This is officially and publicly
24 acknowledged in plain words. The United States Government was
25 clearly on notice of the role of VEB. It confirmed the role of

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1 VEB most recently in imposing sectoral sanctions against it.
2 In stating what it is to the United States Government, it is
3 directly at odds with what Mr. Fee is arguing.

4 THE COURT: Now, he has also said that comments that
5 the defense has made in this case back in May seem to be
6 antithetical to the points you are making now. The defense
7 seemed to be more willing and interested in drawing a
8 distinction between the Russian Federation and VEB in saying
9 that they were separate rather than one and the same, which is
10 a thrust of the motion.

11 MR. HERSHMAN: As your Honor pointed out, in
12 connection with the Curcio proceedings, for a totally different
13 purpose, in responding to your Honor's question about payment
14 of fees, we pointed out that VEB is a separate state-owned --

15 THE COURT: I'm not taking any responsibility for the
16 answer. I may have raised the question in the context of
17 Curcio, but I didn't give the answer. The answer does seem to
18 be somewhat at odds with the argument that you --

19 MR. HERSHMAN: I apologize for any confusion for my
20 answer, your Honor, but intended, as part of that answer, was
21 to address your Honor's question concerning the payment of fees
22 and the separateness of VEB. But what is important about
23 that --

24 THE COURT: Wait. But so that's his point.

25 MR. HERSHMAN: Yes. And I'm going to address the

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1 point.

2 THE COURT: That's his point, is that you -- in that
3 context, in this case, you did say that VEB and the Russian
4 Federation were entirely distinct.

5 MR. HERSHMAN: For purposes of the payment of fees, I
6 pointed out that VEB is a separate state-owned corporation, and
7 that's the point that I made.

8 What controls here and what is relevant is under the
9 CFR and under 951, whether it's a separate state-owned entity
10 or not is not part of the definition of foreign government and
11 not controlling with respect to the application of 951.

12 THE COURT: I thought you said at that time that VEB
13 is a freestanding company under Russian law; it is not an arm
14 or agency of the Russian government, but has a separate and
15 independent corporate existence that is well-recognized under
16 U.S. law.

17 MR. HERSHMAN: Yes.

18 THE COURT: I think you said that on May 14th.

19 MR. HERSHMAN: Yes. And that is correct.

20 As it concerns your Honor's question at the time,
21 which related to the payment of fees only, your Honor directed
22 me to address that question in my letter, which is what we did.
23 But you did not direct us to address what is VEB as it's
24 defined under Section 73.1 or with respect to 951. The fact
25 that it is a freestanding company under Russian law is

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1 irrelevant to --

2 THE COURT: Is irrelevant or --

3 MR. HERSHMAN: Is not relevant to the determination
4 the Court needs to make that pursuant to 73.1 and 951 as
5 written in the statute and regulations, VEB is a foreign
6 government.

7 THE COURT: I don't understand how it could be
8 irrelevant. It's quite the opposite of what you're contending
9 in the motion, it seems to me.

10 MR. HERSHMAN: No, no. My letter isn't the statute,
11 your Honor. What I'm referring the Court to is two different
12 issues. There was an issue concerning instrumentality and
13 payment of fees that your Honor raised in the Curcio hearing.
14 The statement that I made is true.

15 THE COURT: Candidly, I think there's more overlap
16 than distinction. In both context, both in the Curcio context
17 and now, you were all talking about the relationship between
18 the VEB Bank and the Russian Federation. So that's the same
19 issue here. It may have different legal consequences. One is
20 who's paying the legal fees, and another is the applicability
21 of 951.

22 But it's a factual question, and I don't think the
23 facts change between May and today. I do think that there
24 is -- "contradiction" may be too strong a term, but what was
25 said is what was said.

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1 As I said before, I'm not taking responsibility for
2 the answers; I just ask the question in the context of the
3 Curcio hearing. The answer then appears to be different than
4 the answer you're putting forward today. Factual matters, not
5 legal interpretations.

6 MR. HERSHMAN: With all due respect, your Honor, I
7 think perhaps if there was a poor choice of words in respect to
8 the Curcio hearing, which didn't contemplate the current issue
9 or address the current issue, then for that I apologize.

10 THE COURT: That I think is so. It wasn't on
11 anybody's radar --

12 MR. HERSHMAN: Exactly.

13 THE COURT: -- perhaps at the time, but --

14 MR. HERSHMAN: Exactly.

15 THE COURT: I'm not responsible for radar.

16 MR. HERSHMAN: Exactly.

17 But your Honor asked a specific question, which we
18 answered accurately. Sovereign authority is what is relevant
19 here. In terms of making a determination as to whether VEB is
20 a foreign government is encompassed in the definition of
21 foreign government under the relevant statute, that is what is
22 at issue, sovereign authority, and clearly VEB has that.

23 For purposes of this analysis, what the government is
24 urging is that you ignore the regulations in the statute. You
25 can't simply ignore the regulations in the statute, and they

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1 can't get around -- and Mr. Fee did not suggest any way
2 around -- the fitting of VEB clearly into the definition of
3 foreign government in the regulation. It's interesting that he
4 continues to avoid explaining how it's not sovereign authority
5 and it hasn't been delegated sovereign authority to perform
6 quintessential government functions. As far as the United
7 States Government was concerned, they were on notice that
8 that's exactly what VEB was doing, and that's why Mr. Buryakov
9 was being sent here.

10 THE COURT: What is the answer to the question? Is
11 Mr. Buryakov an employee of VEB Bank and/or is he an employee
12 of the Russian Federation?

13 MR. HERSHMAN: He is a representative, deputy
14 representative, of VEB Bank. VEB Bank is encompassed in the
15 definition of foreign government under the regulations. As
16 such, 951(d)(2) applies directly to him.

17 THE COURT: I get that. I'm just asking a more
18 simple, direct question. Is he an employee of the Russian
19 Federation?

20 MR. HERSHMAN: He is an employee of VEB Bank. He is a
21 representative official of VEB Bank. VEB Bank is encompassed
22 in the definition of "foreign government" under the regulation.
23 Therefore, when you look at the exemption section under 951(d),
24 he is exempt from registering. By virtue of his position at
25 VEB Bank --

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1 THE COURT: But is there an answer to my question
2 about whether he's an employee of --

3 MR. HERSHMAN: He's an official --

4 THE COURT: Whoa, whoa. Let me finish the question.

5 Is there an answer to the question about whether he is
6 an employee of the Russian Federation, just yes or no. There
7 may not.

8 MR. HERSHMAN: I think it begs the question, your
9 Honor, with all due respect.

10 THE COURT: I know that. I'm trying to get you not to
11 beg the question; I'm trying to get you to answer the question.

12 MR. HERSHMAN: Well, I understand. But what I'm
13 trying to do is to point your Honor to the actual words of the
14 statute which say --

15 THE COURT: I get that. I got that in your papers
16 too. I'm just trying to figure out --

17 MR. HERSHMAN: I think that he is a
18 publicly-acknowledged foreign official, and he is not required
19 under the terms of the definition in Section 73.1 and 951(d)(2)
20 to further register. He was on notice.

21 THE COURT: I get it.

22 MR. HERSHMAN: Now with respect to the bill of
23 particulars, just briefly, what Mr. Fee ignored was the
24 specific points that we raise on page 22 and 23.

25 THE COURT: I don't mean to cut you off, but here's

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1 procedurally what I'm thinking of doing: I think we should
2 resolve the motion to dismiss first. And if you're successful,
3 then bill of particulars is moot. If the government is
4 successful, then it's not moot.

5 If it's not moot, I would prefer not to resolve it
6 today anyway, because that's something that I think I have been
7 hinting or saying that I expect the lawyers to do more. It's
8 not a criticism, but I would expect the lawyers in a
9 meet-and-confer could take a matter like those presented here
10 further than they are in the papers. That's not a criticism.

11 So I wouldn't rule, even if I get to it on the bill of
12 particulars, today.

13 Does that work for you?

14 MR. HERSHMAN: That works for me.

15 THE COURT: I know you both, and I think you could
16 make more progress, if it came to that, on the bill of
17 particulars without me intervening.

18 MR. HERSHMAN: Okay.

19 THE COURT: All right. Hold on for just a second.

20 (Pause)

21 THE COURT: So as expected and happened, both your
22 papers, both sides, are excellent and the oral argument was
23 very helpful, as well.

24 It's now 12:20. If you are available at 2 o'clock, I
25 should be able to have my thoughts together to give you a

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1 ruling at that time. Does that work for everybody?

2 And can we have the interpreter back at 2, as well?

3 Okay. Thanks. I'll see you then.

4 MR. FEE: Thank you, your Honor.

5 (Recess)

6 A F T E R N O O N S E S S I O N

7 2:05 P.M.

8 THE COURT: Did we lose Mr. Fee?

9 MS. SKOTKO: Yes, your Honor. One standing.

10 THE COURT: First of all, as I said this morning, the
11 papers were terrific and so is the oral argument. I'm going to
12 rule on the first part of the motion, on the motion to dismiss,
13 and then we will see where we are with respect to the bill of
14 particulars.

15 This ruling is based on the entire record of the case,
16 even though I may not cite to or mention other aspects of the
17 case. Certainly without limitation, it includes the complaint
18 in the indictment and also the parties' briefs. I'll probably
19 mention excerpts from them, but I reviewed them in their
20 entirety, and the entire record, oral argument, court
21 appearances, etc., that have happened in this case are part of
22 this ruling.

23 So essentially in the motion to dismiss the defense
24 argues that the indictment fails to state a criminal offense by
25 Mr. Buryakov as a matter of law in several respects. One is

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1 that the indictment fails to negate exceptions found in 18
2 United States Code, Section 951(d). In another, that
3 Mr. Buryakov is exempt from the statute, exempted from the
4 statute, as he is a foreign official. And third, in that any
5 ambiguity under Section 951, and also in particular the
6 terminology or the phrase "publicly-acknowledged and sponsored
7 officials" should be construed in favor of the defendant.

8 A second argument presented by the defense under the
9 motion-to-dismiss rubric is that applying Section 951 to
10 Mr. Buryakov would deprive him of fair warning under the due
11 process clause of the Constitution. And a third branch of the
12 motion to dismiss, related somewhat to the second, is that
13 Section 951 is unconstitutionally vague as applied to
14 Mr. Buryakov.

15 So I'll take each of those in turn.

16 The issue of ambiguity won't be discussed immediately
17 because it's related to two of the other sections, vagueness
18 and due process, etc., but it will be covered.

19 So first as to the issue of failure to negate an
20 exception.

21 Count One of the indictment alleges that Mr. Buryakov
22 engaged in a conspiracy to act as an unregistered agent in the
23 United States; and Count Two alleges that he acted as an
24 unregistered agent in the United States. I'm not going to read
25 Counts One and Two; as I said before, the entire indictment is

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1 incorporated here by reference.

2 According to the defense, the indictment, as I've
3 said, does not negate the statutory exception found at 18
4 U.S.C., 951(d), as it does not allege that at no time material
5 to this indictment was Mr. Buryakov officially and publicly
6 acknowledged and sponsored official or representative of a
7 foreign government.

8 The defense states that where an exception is
9 incorporated into the enacting clause of a statute, the burden
10 is on the prosecution to plead and to prove that the defendant
11 is not within the exception.

12 The government, by contrast, argues that, quote -- I
13 think this is a quote -- not the entire quote, but partially,
14 that the United States Supreme Court has affirmed the settled
15 rule that an indictment need not include allegations negating
16 each exception or affirmative defense in a criminal statute.
17 The government states that the indictment here plainly alleges
18 facts sufficient to prove the elements of both charged
19 offenses, namely, a conspiracy and an attempt to violate
20 Section 951, which provides criminal liability for whoever acts
21 in the United States as an agent of a foreign government
22 without prior notification to the attorney general.

23 Relevant authorities here that I've looked at are Rule
24 7(c)(1) of the Federal Rules of Criminal Procedure, which
25 states, in part, that the indictment must be a plain, concise,

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1 and definite written statement of the essential facts
2 constituting the offense or offenses charged. Also, the Sixth
3 Amendment to the U.S. Constitution is relevant. It says, in
4 part, that in all criminal prosecutions, the accused shall
5 enjoy the right to be informed of the nature and the cause of
6 the accusation.

7 Generally speaking, an indictment need do little more
8 than track the language of the statute charged and state the
9 time and place of the alleged crime. That comes from United
10 States v. Stavroulakis, a Second Circuit case from 1992 found
11 at 952 F.2d 686.

12 It is also true -- and this is a quote from McKelvey
13 v. United States, 260 U.S. 353, a 1922 case which we discussed
14 briefly this morning. This quote is found: "It has come to be
15 a settled rule in this jurisdiction that an indictment or other
16 pleading founded on a general provision defining the elements
17 of an offense or of an exception made by a proviso or other
18 distinct clause, whether in the same section or elsewhere, and
19 that it is incumbent on one who relies on such an exception to
20 set it up and establish it.

21 Also 18 United States Code, 951(a) states, I mentioned
22 this before, but it's worth saying again: Whoever, other than
23 a diplomatic or consular officer or attach, acts in the United
24 States as an agent of a foreign government without prior
25 notification to the attorney general, if required in subsection

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1 (b), shall be fined under this title or imprisoned not more
2 than ten years or both.

3 And the exception, 18 United States Code, 951(d)
4 states: For purposes of this section, the term "agent of a
5 foreign government" means an individual who agrees to operate
6 within the United States subject to the direction or control of
7 a foreign government or official, except that such term does
8 not include any officially and publicly acknowledged and
9 sponsored official or representative of a foreign government.

10 In the instant case, the indictment tracks the
11 language of the statute charged and states the time and place
12 of the alleged crimes. The government is not required, and
13 it's too bad he's not here in this respect, Mr. Fee seemed to
14 indicate to the Court this morning that the government could
15 and may very well do so, that is to say, negate the exception,
16 the applicable exceptions in Section 951 of the indictment.

17 Consequently, the motion to dismiss on this ground is
18 respectfully denied.

19 Now, turning to the 1b exemption. 78 CFR Part 73
20 defines "officially and publicly-acknowledged and sponsored" as
21 meaning that the person described therein has filed with the
22 Secretary of State a fully-executed notification of status with
23 a foreign government or is a visitor officially sponsored by a
24 foreign government whose status is known and whose visit is
25 authorized by an agency of the United States Government.

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1 The term "agent" is defined as follows in 78 CFR Part
2 73: Individuals acting as representatives of or on behalf of a
3 foreign government or official who are subject to the direction
4 or control of that foreign government or official.

5 According to the defense, the indictment alleges that
6 Mr. Buryakov was an employee of a Russian bank, VEB, a Russian
7 state-owned agency.

8 Quote from the defense: "It is a matter of public
9 record that Mr. Buryakov was present in the United States with
10 notice to and authorization by the U.S. Government, which
11 granted him a visa to work as an official at a Russian
12 state-owned agency."

13 Defense also argues that: "On the face of the
14 indictment, which relates only to registration, Mr. Buryakov
15 was a foreign government official, falling squarely into an
16 exception to registration under Section 951 with respect to
17 officially and publicly acknowledged and sponsored officials or
18 representatives of a foreign government."

19 The government counters the following. The government
20 says, and this is a quote: "The fact that Buryakov obtained a
21 work visa to enter the United States as an international banker
22 employed by a New York bank by lying to the United States on
23 his visa application about his intention not to engage in
24 espionage neither conferred upon Buryakov some initial status
25 or immunity nor shielded him from liability under Section 951."

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1 Additionally, the government states that VEB, that's
2 the bank's assets "are drawn from the reorganization of its
3 predecessor institution, asset contributions of the Russian
4 Federation, income from VEB's activities, voluntary asset
5 contributions and donations, as well as other lawful sources."

6 "As such," this is a continuation of the government's
7 quote, "VEB is only partially funded by the Russian
8 Federation."

9 The government also argues that "the fact that VEB
10 appears to be at least partly funded by the Russian Federation
11 and claims to conduct banking activities on behalf of the
12 Russian Federation does not make every employee of the New York
13 bank an official representative of the Russian Federation."

14 According to Defense Exhibit B, which is an English
15 version of the Russian law, appears to be establishing VEB,
16 these points are true. VEB is a state corporation established
17 by the Russian Federation. That's in Article 2, Section 1.

18 The assets of VEB shall be formed with the assets
19 obtained as a result of the reorganization of the bank for
20 foreign economic affairs of the U.S.S.R., the asset
21 contribution of the Russian Federation, income from VEB's
22 activities, voluntary asset contributions and donations, and
23 from other lawful sources. That's in Article 5, Section 1.

24 VEB shall not be liable for the obligations of the
25 Russian Federation. The Russian Federation shall not be held

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1 liable for the obligations of VEB. Article 5, Section 2.

2 The government of the Russian Federation shall, one,
3 appoint and dismiss members of the supervisory board of VEB.
4 That's found in Article 6, Section 2.

5 This is not the entirety of these articles in these
6 sections; these are selected sections by me.

7 Members of the supervisory board of VEB shall be
8 appointed by the government of the Russian Federation for a
9 five-year term. Article 9, Section 4.

10 It is prohibited to delegate the powers of the
11 supervisory board of VEB to the management board of VEB or to
12 the chairman of VEB. Article 12, Section 2.

13 The chairman of VEB is appointed and dismissed by the
14 president of the Russian Federation. Article 15, Section 2.

15 The chairman of VEB is a sole executive body of VEB,
16 and he or she shall direct its ongoing activities. Article 15,
17 Section 1.

18 The Court finds that the defendant, Mr. Buryakov, does
19 not qualify for the exemption in 951 and, relatedly, that VEB
20 does not qualify as a foreign government. Although the Russian
21 law establishing VEB states that VEB is a state corporation, it
22 is clear from the very same Russian law that VEB was funded in
23 part through other nongovernmental sources, and that neither
24 the Russian Federation nor VEB is liable for one another's
25 legal obligations, notwithstanding the defense contention that

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1 the bank is owned by the state, that is to say, by Russia.

2 Counsel for the defense has also argued to this Court
3 that "VEB is a freestanding company under Russian law; it is
4 not an arm or agency of the Russian government, but has a
5 separate and independent corporate existence that is
6 well-recognized under U.S. law." That was contained in a
7 defense letter to the Court dated May 14, 2015 at page 2.

8 Defense counsel has also stated that "The underlying
9 offense in this case has nothing to do with VEB's relationship
10 with the Russian government." Same letter, same page.

11 Defense has also said that the Russian state is not
12 paying -- this was in the context of a Curcio hearing and the
13 retainer agreement for White & Case. The Russian state is not
14 paying for Mr. Buryakov's defense any more than the U.S.
15 Government could be said to be paying for every corporate
16 action taken by the Export-Import Bank of the United States or
17 the Pension Benefit Guaranty Corporation, both companies the
18 shares of which are owned by the United States.

19 Also, in connection with the resolution of third-party
20 payor for defense counsel, there's a letter dated 5/10/2015
21 where the defense says: No conflict is created simply because
22 a third party is paying Mr. Buryakov's legal fees. In
23 particular, we can confirm to the Court that the third party
24 here is not involved in this case and is not related to any
25 codefendant.

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1 On 4/17/2015, the retainer agreement between VEB and
2 White & Case was presented and refers to Mr. Buryakov as
3 "bank's employee" at page 6.

4 In court on May 18, 2015, defense counsel stated: "I
5 don't believe that because VEB is paying the legal fees of an
6 employee of the bank that raises any issues any different from
7 any other criminal case where an employee of an institution is
8 charged and the employer agrees to pay the legal fees of that
9 employee."

10 In the same transcript, defense counsel refers the
11 Court to the agreement between VEB and White & Case in which
12 Mr. Buryakov is referred to, again, as the bank's employee. In
13 the same transcript, defense counsel states: "This is no
14 different from any other corporate entity providing counsel for
15 an employee in view of the corporation and White & Case." And
16 on June 1st, 2015, the transcript contains a confirmation that
17 Mr. Buryakov's employer, VEB, was paying the legal fees.

18 Even assuming arguendo that VEB were to qualify as a
19 foreign government, which I have determined it emphatically
20 does not, defendant would nevertheless still not qualify as
21 being officially sponsored by a foreign government whose visit
22 was authorized by an agency of the United States Government, as
23 his status as an agent of a foreign government was not known to
24 the United States, only his status as a VEB Bank employee was
25 known.

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1 It is alleged that defendant was working as a covert
2 intelligence agent for the Russian Federation, not in a
3 position of a deputy representative of VEB for which he
4 received his visa. And at no point did Mr. Buryakov notify the
5 United States Government or any agency thereof that he was an
6 intelligence agent for the Russian Federation.

7 Moreover, Mr. Buryakov's position as a deputy
8 representative of VEB may very well not qualify as an official
9 or representative of a foreign government, as that position is
10 not one which is subject to the direction or control of the
11 Russian Federation. Under the Russian law establishing VEB,
12 only the chairman and the members of the supervisory board of
13 VEB are hired by either the president of the Russian Federation
14 or the government of the Russian Federation. Mr. Buryakov was
15 neither of those.

16 Further, there does not appear to the Court to be any
17 basis to extend the definition of foreign official to include a
18 wide group of employees, as suggested by the defense, or to
19 employ the definition that may be found in the Foreign Corrupt
20 Practices Act.

21 With respect to vagueness, as I said before, I'm going
22 to get to that in a moment.

23 The motion to dismiss on the 951 grounds is denied.

24 Due process grounds as a basis for dismissal.

25 According to the defense, the indictment represents a

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1 clear break with the U.S. Government's prior use of Section
2 951, namely, the first time the statute ever in its current
3 form has been applied to a foreign government representative
4 openly working as such in the United States.

5 This is a quote from the defense:

6 "Indeed, since the Section 951(d)(2) exemption was
7 added, no reported case has been brought against a foreign
8 government official who has held himself out as such. Instead,
9 prior indictments have charged privately-employed individuals
10 surreptitiously working for foreign governments."

11 A quote from the defense: "The glaring absence of any
12 precedence for the theory of prosecution here shows the fair
13 notice problem."

14 The government's response, in summary, is this:

15 As charged in the indictment, Buryakov was acting as a
16 covert Russian spy embedded at a bank in Manhattan, a bank that
17 by Buryakov's own account, is not an arm or agency of the
18 Russian government, but has a separate and independent
19 corporate existence that is well-recognized under U.S. law.
20 That's citing, again, the letter that I cited a few minutes ago
21 dated May 14, 2005 from the defense.

22 Throughout the period of the charged offenses,
23 Mr. Buryakov was reporting on his intelligence-gathering
24 activities not to his superiors in the New York bank, but to a
25 team of Russian spies -- this all comes from the government's

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1 submission -- but to a team of Russian spies operating in the
2 United States under the cover of their consular posts.
3 Mr. Buryakov regularly passed the intelligence he gathered to
4 other spies during covert meetings with his co-conspirators at
5 locations outside the New York bank.

6 In addition, Mr. Buryakov and his co-conspirators
7 routinely met and discussed the efforts to collect and to take
8 information from unsuspecting sources of intelligence in the
9 United States.

10 Among other things -- this is all from the
11 government's submission -- Mr. Buryakov's co-conspirators
12 specifically discussed Buryakov's past efforts to hide his true
13 job, being a spy for the Russian Federation, from some of his
14 supervisors at a branch of VEB outside of Russia and the United
15 States.

16 Given the substance and nature of these allegations,
17 according to the government, Buryakov cannot credibly claim
18 that he was unaware that he might be held criminally
19 responsible for his misconduct.

20 In determining whether or not a statute satisfies the
21 fair notice prong -- this is a quote from a Second Circuit
22 decision -- we ask whether the statute, either standing alone
23 or as construed, made it reasonably clear that at the relevant
24 time that the defendant's conduct was criminal. The cite is
25 U.S. v. Rosen, 716 F.3d, 691, which is a Second Circuit case

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1 from 2013.

2 The motion to dismiss on due process grounds is,
3 therefore, respectfully denied.

4 The statute provided clear notice to the defendant of
5 what conduct was prohibited, and the indictment clearly sets
6 forth that the defendant violated that statute.

7 Another cite is U.S. v. Lindauer, 2004 Westlaw
8 2813168, a Southern District case from 2004.

9 And the last branch of the motion to dismiss has to do
10 with vagueness. It is related, as I said, to the due process
11 branch, but it's briefed separately.

12 Defense counsel argues that applying Section 951 to
13 Mr. Buryakov would render the law unconstitutionally vague as
14 applied because there would be no meaningful standards to guide
15 application of Section 951 to other foreign officials like
16 Mr. Buryakov. Additionally, the defense states that to the
17 extent the term "publicly-acknowledged and sponsored official"
18 is ambiguous, that ambiguity should be resolved in favor of
19 lenity here, where there is connection between the first branch
20 of the motion and the vagueness issue.

21 Defense counsel argues further that "There are
22 potentially thousands of individuals in the United States like
23 Mr. Buryakov. Persons openly working in representative
24 capacities for foreign government agencies and
25 instrumentalities, but in nonconsular, nondiplomatic posts,

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1 these persons all would be agents of a foreign government under
2 951(a). And if Section 951(d)(2) does not provide them with a
3 safe harbor, they would be vulnerable to prosecution for
4 failing to register. The government could pick and choose whom
5 to address and prosecute based on arbitrary criteria such as
6 nationality or country of origin.

7 And finally from that quote from the defense: "Such
8 uncabined discretion is one of the dangers that the vagueness
9 doctrine prevents." Defense motion at page 19.

10 The government responds that "Buryakov cannot
11 demonstrate that Section 951 is vague as applied to him.
12 Section 951 and related statutes and regulations outline in
13 detail the conduct sought to be proscribed." That's the
14 government response at page 20.

15 The government also states that "In this case the
16 conduct charged in the indictment is clearly proscribed by the
17 statute. The indictment alleges that Buryakov knowingly acted
18 in the United States as an agent of the Russian Federation, and
19 specifically at the direction of foreign officials in the
20 United States who were Russian intelligence agents, and that he
21 conspired to do the same.

22 "The indictment and the underlying complaint outline
23 in detail the actions Buryakov took on behalf of the Russian
24 Federation, all while ostensibly working as a banker in New
25 York for the New York bank." Government response at page 21.

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1 "The void for vagueness doctrine that we are here
2 considering derives from the constitutional guarantee of due
3 process, hence related to the section immediately before this
4 one, which requires that a penal statute define a criminal
5 offense with sufficient definiteness that ordinary people can
6 understand what conduct is prohibited and in a manner that does
7 not encourage arbitrary and discriminatory enforcement." The
8 source of that remark is *Mannix v. Phillips*, 619 F.3d 187, a
9 Second Circuit case from 2010.

10 "Although the doctrine focuses both on actual notice
11 to citizens and arbitrary enforcement, we have recognized
12 recently that the more important aspect of the vagueness
13 doctrine is not actual notice, but the other principal element
14 of the doctrine, the requirement that a legislature establish
15 minimal guidelines to government law enforcement." The cite is
16 *Kolender v. Lawson*, 461 U.S. 352, a 1983 Supreme Court case.

17 The statute here is not vague as applied to
18 Mr. Buryakov; it clearly defines what conduct is prohibited,
19 and the indictment clearly sets forth that the defendant
20 violated this statute. As I started the proceeding this
21 morning saying there is no finding that that is so, the
22 defendant remains subject and able to enjoy the presumption of
23 innocence unless and until a jury determines that he was
24 guilty.

25 Defense acknowledges that the void for vagueness

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1 challenge to 951 has been rejected by several federal courts,
2 although not necessarily in exactly the same context as is
3 presented here. They do that at defense motion page 19 and
4 footnote 12. The cite is United States v. Duran, 596 F.3d
5 1282, it's an Eleventh Circuit case from 2010, where this quote
6 is found: "Section 951 plainly and concretely identifies the
7 conduct which constitutes its violation, and the statute
8 language is clear and unambiguous." See also United States v.
9 Truong, 629 F.2d 908, a Fourth Circuit case from 1980. And
10 also I refer you to United States v. Lindauer again, the 2004
11 case at Westlaw 2813168 from the Southern District, 2004.

12 Consequently, the motion to dismiss on grounds of
13 vagueness is also denied, respectfully.

14 So that leave us then with the motion for a bill of
15 particulars.

16 As I mentioned this morning, it is not my intention to
17 resolve that aspect of the motion at this time, and perhaps I
18 won't need to, because I am directing the parties to meet and
19 confer and see if they cannot resolve all of the issues which
20 are presented in defendant's motion.

21 Hold on for one second.

22 (Pause)

23 THE COURT: So here's what I'm going to do: I'm going
24 to schedule a further conference for September 2 at 2 p.m. And
25 that essentially would presume that you're able to meet and

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1 confer to continue the progress of the case until then. If
2 there were some problem that came up in the meantime that
3 required court attention, you'll let me know by correspondence,
4 I'm sure.

5 MR. HERSHMAN: Your Honor, September 2nd is for what
6 purpose?

7 THE COURT: Status conference. Just to see --
8 September 2nd.

9 MR. HERSHMAN: I think that's a little long for us, if
10 we are not able to get access to the material.

11 THE COURT: What I'm trying to say is that in setting
12 that date aside assumes that you are able to work things out.
13 In the event that you aren't, then I probably will hear from
14 you by correspondence and we'll see what I can do for you
15 sooner than that.

16 MR. HERSHMAN: We are interested in setting a trial
17 date.

18 THE COURT: I can do that right now.

19 MR. HERSHMAN: Okay.

20 THE COURT: When do you want to go to trial?

21 MR. HERSHMAN: Sometime in November or December.

22 MS. SKOTKO: Your Honor, sorry.

23 Could we have a moment to just confer?

24 (Pause)

25 MR. HERSHMAN: One second, your Honor.

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1 (Pause)

2 MR. HERSHMAN: So, your Honor, I think, having had the
3 opportunity to confer with the government, what we would
4 suggest is an earlier conference date, status conference date,
5 maybe two weeks from now, during which interim point we will
6 discuss the various issues that we need to discuss, which
7 include the meet-and-confer on the discovery, but also any
8 potential issues that may arise here and other issues relating
9 to classified material.

10 THE COURT: No, I still prefer to keep the schedule
11 that I set, which is September 2, because I think that the
12 defendant has a right to the government's assistance with
13 respect to the discovery. I think if you talk together in good
14 faith, you will resolve virtually all of those issues.

15 So it's only in the event that you can't that we may
16 have to go to plan B. But, for now, I'm going to have the
17 status conference on September 2 at 2 p.m.; the trial is on
18 December 7, 2015, at 9 a.m. There will be a final pretrial
19 conference on December 1, 2015, at noon.

20 And here is the pretrial submission schedule:

21 First of all, the documents I'm about to describe will
22 be due on November 6, and they are as follows: First, joint
23 jury instructions. And I want to come back to that and talk
24 about how we do that. The joint verdict sheet, a one-sentence
25 statement of the case and a one-sentence statement of the

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1 defense. That's for purposes of the voir dire.
2 Hypothetically, you could say, The government contends AB, and
3 the defendant responds. A list of names and places that may
4 come up in the trial also for purposes of the voir dire. And
5 motions in limine.

6 So each side, one motion, although it obviously may
7 have different branches to it, but one document which contains
8 whatever you have to assert by way of motion in limine. And
9 those are, both for the government and the defense, due on
10 November 6.

11 And on November 13, any responses to motions in limine
12 that may have been served.

13 Now, back to the joint jury instructions.

14 So in a criminal case I ask the government to do the
15 first draft of the jury instructions at least two weeks before
16 they're due. On November 6 they should be presented to the
17 defense. The defense has the opportunity then to review the
18 instructions, to accept or adopt any instructions that it's
19 comfortable with. As to any instruction that it has an
20 objection to, on the same disk, or however it's presented to
21 you, to note briefly your legal objection, and then the
22 instruction that you would prefer to have in place of the
23 government's instructions. So there I have it in one document,
24 both sides' position.

25 Christine will give you a sample set of jury

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1 instructions. I would ask the government and the defense to
2 use as many of the so-called boilerplate instructions as I
3 typically do use, and for all of you then to focus your
4 attention on the substantive charges that relate to this case.

5 And the same is true of the joint verdict sheet. The
6 government does the first draft, gives that to the defense, and
7 the defense would either say yes or no or what they would say
8 differently. And that also would be presented with the defense
9 package as a joint enterprise with the government on November
10 6.

11 So I think that's about as quick as I can give you,
12 but I think you probably need that time to get ready for trial.
13 I'm happy to accommodate you on December 7.

14 Just as a heads up, I think the end of the month I'm
15 going to be away between Christmas Day and January 1st.
16 Perhaps we wouldn't have trial then anyway, if the trial was
17 still ongoing. But just so you know for scheduling purposes,
18 I'm planning to be away for that -- it's a little less than a
19 week, I think.

20 So anybody have any questions? No?

21 MS. SKOTKO: Yes, your Honor, just to flag this for
22 your Honor's attention.

23 We are still in the process of determining whether
24 there will be any motions pursuant to the Classified
25 Information Procedure Act. If we anticipate that there might

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1 be something under Section 4 or any other sections, I would
2 suggest that perhaps we could write to the Court and defense
3 counsel and propose a schedule for the filing of those motions.

4 THE COURT: So it's always best if you could meet and
5 confer, and jointly then you could send me a letter and say
6 this is what you propose, and they either agree or disagree.
7 It could all be contained in the same letter. You could
8 represent them or they could represent you. Probably it's
9 something you might do.

10 MS. SKOTKO: Yes, your Honor.

11 And just to clarify, pursuant to the schedule, there
12 are no further motion practice --

13 THE COURT: That's it.

14 So if I don't hear anything from you, I'll see you on
15 September 2nd. If I do, then we'll go to plan B, which is yet
16 to be devised.

17 All right. Great. Nice to see you.

18 Thanks very much.

19 (Pause)

20 THE COURT: Please be seated, everybody.

21 I forgot to ask at the close of the earlier proceeding
22 two minutes or so ago whether there was a speedy trial issue or
23 application that would take us to December 7, 2015, which is
24 the trial date.

25 MS. SKOTKO: Yes, your Honor.

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1 I apologize, that was my omission.

2 The government would respectfully request that time be
3 excluded through December 7th, which is the commencement of the
4 trial, to give the parties an opportunity to -- specifically
5 for the defense to review discovery and to prepare for trial.

6 THE COURT: I'm going to find under 18 United States
7 Code, Section 3161, that the request for adjournment is
8 appropriate and warrants exclusion of the adjourned time from
9 speedy trial calculations.

10 I further find that the exclusion is designed to
11 prevent any possible miscarriage of justice, to facilitate
12 these proceedings, including preparation for trial, and to
13 guarantee effective representation of and preparation by
14 counsel for both parties. Thus, the need for exclusion and the
15 ends of justice outweigh the interests of the public and the
16 defendant in a speedy trial, pursuant to 18 U.S.C., Section
17 3161(h) (7) (A) and (B).

18 And just to reiterate -- I think we made the point
19 before -- between now and the trial date, apart from what is
20 scheduled to be filed, if anybody is entertaining some other
21 form of filing, that would have to be preceded by a letter to
22 the Court explaining what that is, and then we'll take the next
23 step. Okay?

24 Great. Thanks very much.

25 * * *

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